

Vernon E. Leverty, NV Bar No. 1266
Patrick R. Leverty, NV Bar No. 8840
LEVERTY & ASSOCIATES LAW CHTD.
832 Willow Street
Reno, NV 89502
Telephone: (775) 322-6636
Attorneys for Plaintiff
Community Owned Mercantile Project, Inc.
aka Garnet Mercantile

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

COMMUNITY OWNED MERCANTILE
PROJECT, INC. aka GARNET
MERCANTILE

CASE NO. 3:15-cv-00134-LRH-WGC

Plaintiff,

vs.

**PLAINTIFF'S OPPOSITION TO
DEFENDANT PEERLESS INDEMNITY
INSURANCE COMPANY'S MOTION
TO DISMISS**

PEERLESS INDEMNITY INSURANCE
COMPANY, a New Hampshire Corporation;
DOES I-XXX; and ABC CORPORATIONS
A-Z; inclusive,

Defendants.

Plaintiff Community Owned Mercantile Project, Inc. aka Garnet Mercantile ("Garnet Mercantile"), by and through its counsel of record Leverty & Associates Law Chtd., hereby oppose Defendant Peerless Indemnity Insurance Company's motion to dismiss. This Opposition is made and based on the papers and pleadings on file herein, the following Memorandum of Points and Authorities and any oral argument the Court may entertain.

DATED: This 23rd day of March, 2015.

LEVERTY & ASSOCIATES LAW CHTD.

/S/ Patrick Leverty

Vernon E. Leverty, Esq., NV Bar No. 1266
Patrick R. Leverty, Esq., NV Bar No. 8840
832 Willow Street
Reno, Nevada 89502
Ph: (775) 322-6636 • Fax: (775) 322-3953
Attorneys for Plaintiff Garnet Mercantile

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Peerless Indemnity Insurance Company (“Peerless Indemnity”) requests the court dismiss this lawsuit because of Garnet Mercantile’s alleged failure to comply with all policy terms. Peerless is wrong. Garnet Mercantile complied with all policy terms that explicitly required compliance prior to bringing this lawsuit. The appraisal provision is *optional*. Either party *may* invoke it. For over two years after the loss, neither party chose to invoke the *optional* appraisal provision. Prior to filing the lawsuit neither party demanded appraisal. There is no basis to dismiss this lawsuit.

Peerless Indemnity’s attempt to manufacture non-compliance with the policy terms by demanding appraisal **after** Garnet Mercantile properly filed the lawsuit and **after** the two year suit limitation expired must be rejected. Garnet Mercantile would be severely prejudiced if the court dismisses this lawsuit based on Peerless Indemnity’s belated demand for appraisal. The Policy has a two year suit limitation provision that states any lawsuit against Peerless Indemnity must be filed within two years of the loss. Just before that two year limitation expired, Garnet Mercantile timely filed this lawsuit. A dismissal based on Peerless Indemnity’s belated demand for appraisal would severely prejudice Garnet Mercantile’s rights because it would vitiate Garnet Mercantile’s constitutional rights to a trial by jury.

Furthermore, an appraisal will not resolve the parties’ dispute. Garnet Mercantile contends Peerless Indemnity breached the contract and acted in bad faith when it failed to fully evaluate the loss. An insurance company is required to fully and completely evaluate the loss. In violation of that undisputed standard, Peerless Indemnity did not put an amount on all the damaged stock. Peerless Indemnity’s belated demand for appraisal is a classic example of an insurance company shirking its duty to investigate a claim and instead foisting the cost of an investigation onto the insured.

The appraisal provision in Peerless Indemnity’s policy is extremely narrow. It only allows for appraisal when the parties’ dispute the value of an item. In this case, the parties’ dispute does not center on the value(s) Peerless Indemnity put on any item(s). Rather, the dispute centers on

1 how Peerless Indemnity utterly failed to fulfill its duty and obligation of conducting a full and
 2 fair investigation and evaluation of the loss. Appraisal is not an appropriate forum to resolve the
 3 dispute. This is especially true when a Plaintiff has claims for bad faith and violations of Nevada
 4 Unfair Claims Practices Act, which are clearly and unequivocally not subject to appraisal. At a
 5 minimum, the Court must deny the stay pending any appraisal as any further delay severely
 6 prejudices Garnet Mercantile.

7 **II. ISSUES PRESENTED**

8 1. Was Garnet Mercantile in full compliance with the essential Policy terms when it
 9 brought the lawsuit?

10 2. Can the Court consider Peerless Indemnity's demand for appraisal on a motion to
 11 dismiss pursuant to Fed. R. Civ. Pro. 12(b)(6)?

12 3. Does Peerless Indemnity's alternative request to stay all proceedings and to
 13 compel appraisal violate District of Nevada Special Order 109(III)(F)(4)?

14 4. Did Peerless Indemnity waive the right to demand an appraisal?

15 5. Can Garnet Mercantile's breach of contract claim be resolved by an appraisal?

16 6. Would the very narrow appraisal provision resolve Garnet Mercantile's bad faith
 17 and violations of Nevada's Unfair Claims Practices Act causes of action?

18 7. Is Peerless Indemnity entitled to further delay the proceedings with a stay?

19 **III. FACTUAL AND PROCEDURAL HISTORY**

20 On or about January 16, 2013, Garnet Mercantile's business, located at 363 Aultman
 21 Street, Ely, Nevada, suffered water damage due to freezing that severely damaged the business
 22 inventory. Complaint at ¶8. Garnet Mercantile timely notified Peerless Indemnity of the loss. *Id.*
 23 at ¶11.

24 Peerless Indemnity opened up claim number 705124500. *Id.* at ¶12. Garnet Mercantile
 25 performed all tasks required of it. *Id.* at ¶13. Peerless Indemnity determined the value of the
 26 damaged property. Mtn at 2:26-27. Peerless Indemnity paid Garnet Mercantile the amount it
 27 valued the damaged property. Complaint at ¶14.

28 There is no dispute between the parties as to the value Peerless Indemnity put on the

1 damaged property it evaluated. Garnet Mercantile's and Peerless Indemnity's dispute concerns
 2 the scope of the loss. "Following Peerless' payment, Plaintiff purchased replacement stock, but
 3 was only able to fill ½ of the store." Mtn (Doc 5) at 2:27-3:1. Garnet Mercantile then notified
 4 Peerless that it failed to account for "additional stock" that was present at the time of the loss. *Id.*
 5 at 3:1-3:3. On November 8, 2014, Garnet Mercantile sent a letter to Peerless Indemnity regarding
 6 the scope of the loss and how Peerless Indemnity failed to account for the additional stock.
 7 Complaint at ¶16. Peerless Indemnity never responded to that letter. *Id.*¹

8 On January 15, 2015, Garnet Mercantile filed a complaint in Nevada State Court against
 9 Peerless Indemnity. *See* Exh. A to Doc 5. The policy Peerless Indemnity issued to Garnet
 10 Mercantile contains a two-year suit limitation period that requires Garnet Mercantile file any
 11 lawsuit within two years of the date of the loss. Complaint at ¶17. That provision provides:

12 4. Legal Action Against Us

13 No one may bring a legal action against us under this insurance unless:

14 **a.** There has been full compliance with all of the terms of this insurance;
 15 and

16 **b.** The action is brought within 2 years after the date on which the direct
 physical loss or damage occurred.

17 Exh. C to Doc 5 at PEERLESS-GARNET MERCANTILE 000066 (emphasis added). Garnet
 18 Mercantile's complaint was filed within the two-year suit limitation provision. At the time the
 19 legal action was commenced against Peerless Indemnity, Garnet Mercantile was in full
 20 compliance with all of the terms of the insurance policy.

21 On March 2, 2015, Peerless Indemnity removed this case to the United States District
 22

23 ¹ Peerless Indemnity's delay constitutes unfair "claims settlement practices" under Nevada law and a breach
 24 of the covenant of good faith and fair dealing as set forth in Garnet Mercantile's second and third causes of action.
 Both of those claims are not subject to the "appraisal" clause of the policy.

25 Peerless Indemnity demanding appraisal after the expiration of the two year suit limitation is evidence of its
 26 continuing breach its duty of good faith and fair dealing. *See White v. Western Title Insurance Co.*, 40 Cal. 3d 870,
 710 P.2d 309, 320-321, 221 Cal. Rptr. 509 (1985) (Grodin, J., concurring) ("Where an insurer has unreasonably and
 27 in bad faith withheld payment of benefits due under a policy prior to litigation, and then continues this bad faith
 conduct after a complaint is filed, there seems to be no compelling reason why the right to recover for that continuing
 28 wrong should terminate . . . because the insured, under the compulsion of the insurer's recalcitrance, decides to file
 suit himself."); *Knotts v. Zurich Ins. Co.*, 197 S.W.3d 512 (Ky. 2006) (holding a filing of a complaint did not
 terminate an insurers duties and obligations to the insured) and *Sher v. Lafayette Ins. Co.*, 988 So. 2d 186, 199 (La.
 2008) (finding the duty of good faith and fair dealing continues through the litigation process).

Court. On March 9, 2015, Peerless Indemnity filed a motion to dismiss claiming Garnet Mercantile did not comply with the “Legal Action Against Us” provision. Peerless Indemnity claims Garnet Mercantile did not comply with all Policy terms because it did not participate in appraisal prior to filing the lawsuit. The optional appraisal provision provides:

2. Appraisal

If we and you disagree on the amount of loss, either may make written demand for an appraisal of the loss. **In this event**, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:

- a. Pay its chosen appraiser; and
- b. Bear the other expenses of the appraisal and umpire equally.

If there is an appraisal, we will still retain our right to deny the claim.

Exh. C to Doc 5 at PEERLESS-GARNET MERCANTILE 000066 (**emphasis added**).²

Since appraisal is optional it is not something an insured is required to comply with prior to filing suit. Therefore, Plaintiff’s lawsuit was properly filed and the Court cannot dismiss the case based upon the alleged failure to comply with the “Legal Action Against Us” provision.

IV. LEGAL ARGUMENT

A. The Court Cannot Dismiss this Case Based on the “Legal Action Against Us” Provision.

Peerless Indemnity contends Garnet Mercantile has not complied with all terms of the Policy and so the Policy’s “Legal Action Against Us” provision dictates this case be dismissed. To that end, Peerless Indemnity claims “compliance with the Policy’s appraisal provision is a condition precedent to Plaintiff pursuing legal action.” Doc 5 at 7:16-17(emphasis added). Peerless Indemnity then claims “if Plaintiff continues to pursue this lawsuit without first complying with the Policy’s appraisal provision, Plaintiff will be in breach of a condition precedent of the Policy.” *Id.* at 7:25-8:1 (**emphasis added**). Peerless Indemnity conveniently

² The emphasized language clearly conveys that the appraisal process is optional (i.e. not mandatory) and therefore **not** a condition precedent to filing a lawsuit.

1 misreads its own policy.

2 The language in an insurance policy is viewed in its plain, ordinary and popular meaning.
3 *American Excess Ins. Co. v. MGM Grand Hotels, Inc.*, 102 Nev. 601, 604 (1986); *Nat'l Union*
4 *Fire Ins. Co. of State of Pa., Inc. v. Reno's Executive Air, Inc.*, 100 Nev. 360 (1984).

5 Peerless Indemnity's appraisal provision, provides in pertinent part, "If we and you
6 disagree on the amount of loss, either may make written demand for an appraisal of the loss."
7 Exh. C to Doc 5 at PEERLESS-GARNET MERCANTILE 000066 (**emphasis added**).

8 Appraisal under the Policy is optional and thus not a condition precedent to bringing a
9 lawsuit. If Peerless Indemnity had wanted appraisal to be a condition precedent to filing suit it
10 could have explicitly stated that. *See Pasillas v. HSBC Bank USA*, 127 Nev. Adv. Rep. 39, 255
11 P.3d 1281, 1285 (2011) (stating the use of the word "shall" or "must" indicates a mandatory
12 duty). Instead, Peerless Indemnity used the term "may" making appraisal optional. The "word
13 'may' usually is employed to imply permissive, optional or discretionary, and not mandatory
14 action or conduct." *State ex rel. Secretary of Social & Rehabilitation Services v. Jackson*, 249
15 Kan. 635, 642 (Kan. 1991). Therefore, the Policy does not explicitly make compliance with
16 appraisal a condition precedent to bringing a lawsuit. *See Las Vegas Metro. Police Dep't v.*
17 *Coregis Ins. Co.*, 127 Nev. Adv. Rep. 47, 256 P.3d 958, 962 (2011) ("When an insurance policy
18 explicitly makes compliance with a term in the policy a condition precedent to coverage, the
19 insured has the burden of establishing that it complied with that term."). At a minimum, the
20 Policy is ambiguous as to whether appraisal is required before filing suit and all doubts must be
21 construed in favor of the insured. *Insurance Corp. of America v. Rubin*, 107 Nev. 610, 616, 818
22 P.2d 389, 392 (1991) (The insurer is in complete control of the language of the policy and all
23 doubt or ambiguity is construed against the insurer and in favor of the unknowing consumer).

24 In stark contrast to the optional appraisal provision in the Policy, appraisal was
25 **mandatory** in the cases Peerless Indemnity relies upon in its motion to dismiss the case. *See* Doc
26 5 at 6:6-7:6 and FN 21-25. In *Cuadros v. State Farm Fire & Cas. Co.*, 2014 U.S. Dist. LEXIS
27 177172, *2 (Dec. 23, 2014), the Court made it clear that it viewed the appraisal provision as
28 mandatory, writing "Plaintiff's policy includes a **mandatory** appraisal provision ..." *See also*

Herrera v. Allstate Fire Cas. Co., 2013 U.S. Dist. LEXIS 174184 (Dec. 6, 2013).³ In *Enger v. Allstate Ins. Co.*, 407 Fed. Appx. 191 (9th Cir. 2010), the Ninth Circuit considered the appraisal provision that was taken from the statutory standard form, Cal. Ins. Code § 2071(a). That California Code provision provides that appraisal is **mandatory**: “In case the insured and this company **shall** fail to agree as to the actual cash value or the amount of loss, then, on the written request of either, each **shall** select a competent and disinterested appraiser and notify the other of the appraiser selected within 20 days of the request.” It is unclear from the text of the *Redzepagic v. CSAA Gen. Ins. Co.*, 2014 U.S. Dist. LEXIS 114349 (Aug. 18, 2014) decision whether the appraisal provision was mandatory or not. From the text of that decision, however, it is clear the *Redzepagic* Court followed the decision in *Enger v. Allstate* without regard to the language of the policy at issue, which is improper.⁴

Courts refuse to dismiss lawsuits based on the “Legal Action Against Us” provision when compliance with a policy term, like the *optional* appraisal provision in this Policy, is not essential. The Court in *Enyart v. Nationwide Mut. Ins. Co.*, 1994 Ohio App. LEXIS 5640, 11 (Ohio Ct. App., Cuyahoga County Dec. 15, 1994) refused to dismiss the lawsuit under the “legal action against us” provision when an arbitration provision was *optional*:

Lastly, ... this court concludes that the policy grants the parties the right to seek arbitration, but does not mandate that they do so. The subject policy provides simply that “No legal action may be brought against us concerning this policy unless the insured has fully complied with all its terms,” then sets forth an arbitration procedure which either party **may** invoke, and various procedural rules. Under no fair interpretation can this be deemed to constitute a mandatory arbitration procedure which is to be pursued in the event of a dispute between the parties. (emphasis added).

In *Phoenix Indem. Co. v. Zinn*, 281 P.2d 1065 (Kan. 1955), the Kansas Supreme Court

³ The Court in *Herrera v. Allstate Fire Cas. Co.*, 2013 U.S. Dist. LEXIS 174184 (Dec. 6, 2013) did not dismiss the case based on the appraisal provision. Instead the Court granted the separately filed motion to compel arbitration.

⁴ Under Nevada law, an insurance policy is a contract that must be enforced according to its terms to accomplish the intent of the parties. *Farmers Ins. Exch. v. Neal*, 119 Nev. 62, 64 P.3d 472, 473 (2003). It is improper for a Court to not consider the language of the insurance policy at issue. See *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. ___, ___, 252 P.3d 688 (2011) (overturning trial court’s grant of summary judgment because the trial court did not consider the language of the Liberty Mutual policy but instead relied on a decision construing a State Farm policy).

1 concluded the trial court correctly determined the appraisal provision did not create a condition
 2 precedent to an action by the insured on the policy. The Kansas Supreme Court found it could not
 3 conclude the appraisal provision “created a condition precedent to an action by the insured on the
 4 policy. *Id.* at 1069. The Court further wrote, “The language contained therein is clear,
 5 unequivocal, unambiguous and plain. Something would have to be read into this paragraph to
 6 make it a condition precedent, which the trial court did not do, and we do not feel constrained so
 7 to do since no authority therefor has been cited, nor are we able to find any.” *Id.*; *see also*
 8 *Bombardier Corp. v. AMTRAK*, 298 F. Supp. 2d 1, 5 (D.D.C. 2002).⁵

9 Garnet Mercantile complied with all policy terms that explicitly required compliance
 10 prior to filing its complaint. Appraisal is optional. Appraisal is not a condition precedent to filing
 11 a lawsuit. Accordingly, there is no ground to dismiss this lawsuit based on the “Legal Action
 12 Against Us” provision.

13 **B. The Court Cannot Consider Peerless Indemnity’s Demand for Appraisal In**
 14 **Deciding the Motion to Dismiss.**

15 Peerless Indemnity’s motion to dismiss is brought pursuant to Fed. R. Civ. Pro. 12(b)(6).
 16 *See* Doc 5 at 4:19-5:12. In addressing a motion to dismiss brought pursuant to Fed. R. Civ. Pro.
 17 12(b)(6), a court may consider documents attached to the complaint, documents incorporated by
 18 reference in the complaint, or matters of judicial notice. *United States v. Ritchie*, 342 F3d 903,
 19 908 (9th Cir. 2003). “Even if the document is not attached to a complaint, it may be incorporated
 20 by reference into a complaint if the plaintiff refers extensively to the document or the document
 21 forms the basis for plaintiff’s claim ... for example, when a plaintiff’s claim about insurance
 22 coverage is based on the contents of a coverage plan ...” *Id.*

23 ⁵ In *Bombardier Corp. v. AMTRAK*, 298 F. Supp. 2d 1, 5 (D.D.C. 2002), the Court concluded the Plaintiff
 24 was free to pursue its claims in court when the dispute resolution process called for in the contract was *optional*:

25 Not only does the Contract fail to clearly and unambiguously state that dispute resolution is a condition
 26 precedent to litigation, it contains two provisions that arguably make the parties’ participation in dispute
 27 resolution optional, not mandatory. In Article 29.3, the Contract states that if the Contractor -- Bombardier --
 28 disagrees with either the COR’s or COTR’s decision, the Contractor “may pursue the Claim in accordance with
... Article 32,” the dispute resolution procedures. Article 29.3 [] . . . By using the words “may,” and “or,” the
Contract suggests that the Contractor may permissibly choose not to engage in the dispute resolution procedures
of Article 32. Construed together, it appears that the Contractor is free to pursue its claims in court, without first
engaging in dispute resolution under Article 32, once it has submitted its Claims to the COR or COTR.
 (emphasis added).

Peerless Indemnity never moved the court to consider the demand for appraisal.⁶ Peerless Indemnity's failure is likely because it recognizes there is no basis for the court to consider its belated demand for appraisal on a motion to dismiss brought pursuant to Fed. R. Civ. Pro. 12(b)(6). The demand for appraisal was not attached to the complaint and was not referenced in the complaint because there had been no demand for appraisal prior to Garnet Mercantile filing the complaint. Furthermore, the demand is not a judicially noticeable adjudicative fact. *See Cuadros v. State Farm Fire & Cas. Co.*, 2014 U.S. Dist. LEXIS 177172, *7 (Dec. 23, 2014) (finding the court could not take judicial notice of the letter). Lastly, Garnet Mercantile disputes that Peerless Indemnity properly invoked its appraisal rights. *See* Section IV.D. Waiver, below. Accordingly, the Court cannot consider the demand for appraisal in considering Peerless Indemnity's motion to dismiss pursuant to Fed. R. Civ. Pro. 12(b)(6).

C. Peerless Indemnity's Alternative Request to Stay Proceedings and to Compel Appraisal Violates District of Nevada Special Order 109(III)(F)(4).

District of Nevada Special Order 109(III)(F)(4) mandates a separate document be filed on the docket for each purpose. Peerless Indemnity filed a motion to dismiss as Docket No. 5. Peerless Indemnity never filed a motion to compel appraisal and to stay all proceedings as a separate document. Therefore, the court cannot entertain Peerless Indemnity's motion to compel appraisal because it is not properly before the court.

D. Peerless Indemnity Waived the Right to Demand Appraisal.

"In the law of insurance waiver is defined as the giving up of a known privilege or power." *Violin v. Fireman's Fund Ins. Co.*, 81 Nev. 456, 462, 406 P.2d 287 (1965). Under Nevada law, a "waiver is an intentional relinquishment of a known right. In order to be effective, a waiver must occur with full knowledge of all material facts." *Thompson v. City of North Las Vegas*, 108 Nev. 435, 833 P.2d 1132, 1134 (1992). A waiver "may be express or implied from circumstances." *Violin*, *supra*. 81 Nev. at 462.

The Policy issued by Peerless Indemnity to Garnet Mercantile contains a suit limitation

⁶ Peerless Indemnity did request the court consider the Certified Copy of the Policy. Mtn., Doc 5, at 5:17-19. Plaintiffs acknowledge the Policy was referenced in the complaint and therefore it can be considered by the Court. Peerless Indemnity, however, did not move the court to consider the demand for appraisal.

1 provision that requires a lawsuit be initiated within two years of the loss. *See* Exhibit 3 to Doc 5
 2 at PEERLESS-GARNET MERCANTILE 000066. The loss occurred on January 16, 2013. *See*
 3 Exh. A to Doc 5. Peerless Indemnity did not demand appraisal until March 4, 2015, almost two
 4 months after the expiration of the two year suit limitation. Peerless Indemnity waived appraisal
 5 by not demanding appraisal within the Policy's two year suit limitation period.

6 In *Keesling v. Western Fire Ins. Co. of Fort Scott Kan.*, 10 Wn. App. 841, 520 P.2d 622
 7 (Wash. App. 1974) the court explained that "[w]hether a demand for appraisal has been made
 8 within a reasonable time depends upon the circumstances of the case . . . [including the two main
 9 factors of] prejudice resulting from the delay, and the breakdown of good-faith negotiations
 10 concerning the amount of loss." *Id.* at 628. In that case, only eight months had passed since the
 11 date of loss, thus the court found the request for appraisal had been timely made. By contrast, the
 12 request for appraisal in the current case was made over two years from the date of loss, and after
 13 the two year suit limitation had expired. Therefore, Plaintiff would be extremely prejudiced by a
 14 dismissal based on the belated demand for appraisal as a lawsuit filed after appraisal would be
 15 beyond the suit limitation provision.

16 In *Johnson v. Mut. Serv. Cas. Ins. Co.*, 732 N.W.2d 340, 346 (Minn. Ct. App. 2007), a
 17 demand for appraisal was found to be barred by the policy's two year suit limitation. The trial
 18 court denied the insured's motion to compel appraisal because the insured did not demand
 19 appraisal until after the policy's suit limitation had expired. The insured's property was damaged
 20 by fire and the insured and insurer disputed the amount of the loss. The policy contained an
 21 appraisal clause and a two-year limitations period. The insured demanded appraisal after the
 22 limitation period. The trial court concluded the demand for appraisal was barred by the policy's
 23 two year suit limitations period. On appeal, the Minnesota Appellate Court affirmed the trial
 24 court's decision, concluding that where the statute of limitations had run on any claim under the
 25 policy, forcing the parties to submit to an appraisal would be futile. *See also School Dist. No. 1 v.*
 26 *Globe & Republic Ins. Co.*, 146 Mont. 208, 404 P.2d 889, 893 (Mont. 1965) (in *dicta* that Court
 27 wrote "the policies necessarily contemplate a demand within a year after loss is incurred by
 28 requiring that a suit upon the policy be brought within that period" and that the one-year suit

1 limitation period in the policies at issue “serves to reveal the parties’ intent concerning the period
2 within which appraisal may be requested.”).

3 In *Meineke v. Twin City Fire Ins. Co.*, 181 Ariz. 576, 892 P.2d 1365 (Ariz. Ct. App. 1994)
4 the Court analyzed whether the insurance company waived the right to appraisal. The court found
5 that an appraisal is waived if not requested within the policy’s one year suit limitation provision:

6 The failure of one party to demand arbitration within one year would prejudice the
7 other party’s right to file a timely lawsuit. Whether delay in demanding arbitration
8 results in prejudice to the other party is a major concern in determining waiver.
9 If we held that a timely appraisal demand could be made after one year in the
10 circumstances of this case we would encourage insurance companies to lure or lull
insureds past the timely filing date for a lawsuit whereupon the insured would be
forced to rely upon the appraisal procedure for redress when the policy clearly
indicates appraisal is voluntary.

11 892 P.2d at 1371.⁷

12 The record demonstrates Peerless Indemnity waived appraisal. On November 8, 2014,
13 Garnet Mercantile wrote to Peerless Indemnity about how it failed to account for all the damaged
14 personal property. Complaint at ¶16. Nevada law mandates Peerless Indemnity promptly respond
15 to its insured’s communications. NRS 686A.310(1)(b) provides that it is an unfair practice for an
16 insurer to fail “to acknowledge and act reasonably promptly upon communications with respect
17 to claims arising under insurance policies.” NAC 686A.665(3) states that an insurer must reply
18 within 20 working days to any communication from an insured “if the communication reasonably
19 suggests that a response is expected.” Despite being legally required to respond to Garnet
20 Mercantile’s November 8, 2014, letter, Peerless Indemnity never responded and never demanded
21 appraisal. Complaint at ¶16.

22 During that time period, Peerless Indemnity also failed to inform Garnet Mercantile about
23 the looming expiration of the two year limitation period in violation of Nevada law. NAC
24 686A.675(5) provides, “Insurers may not delay settlement of a claim directly with a claimant
25 who is not an attorney or represented by an attorney by extending negotiations until the
26

27 ⁷ See also *Lynch v. American Family Mut. Ins. Co.*, 163 Wis. 2d 1003, 473 N.W.2d 515 (Wis. Ct. App.
28 1991) (holding that, “absent a policy provision to the contrary, an insurance company may not demand an appraisal
of a loss after the commencement of an action by the insured on that loss when the insurance company failed to
demand the appraisal prior to the lawsuit even though it had an opportunity to do so”).

claimant's rights may be affected by a statute of limitations or a time limit which is part of an insurance contract or policy, without giving the claimant written notice that the time limit may be expiring and may affect the claimant's rights. Notice must be given 60 days before the date on which a time limit may expire." (Emphasis added). Peerless Indemnity's blatant violations of Nevada law should not be rewarded.

Facing the looming two year suit limitation and without Peerless Indemnity demanding the *voluntary* appraisal, Garnet Mercantile had only one option - file this lawsuit. Peerless Indemnity's request to dismiss this lawsuit based on its demand for appraisal after the two year suit limitation expired would severely prejudice Garnet Mercantile. "Prejudice to a party may arise in a number of ways that demonstrate harm to a party's legal rights or financial position." *See e.g. In Re Universal Underwriters of Texas*, 345 S.W.2d 404, 411-12 (Tex. 2011) (defining prejudice for purposes of waiver of arbitration as inherent unfairness in terms of delay, expense, or damage to a parties legal or financial position). *See also Annot. Failure of Attempted Appraisal Under Policy of Insurance As Affecting Rights and Remedies of Parties*, 94 A.L.R. 499, p. 13(sup. 2013)("Both parties have a duty regarding an appraisal as a condition of litigation to act in good faith and make a fair effort to carry out the agreement to accomplish its object and failure to do so through the fault of the insurer abrogates that requirements and the insured is absolved from compliance"). Dismissal would vitiate Garnet Mercantile's legal position as it would not be able to bring suit because of the two year suit limitation period. Peerless Indemnity's belated demand for appraisal is an affront to Garnet Mercantile's constitutional rights to a jury trial.

E. The Parties' Dispute Does Not Concern the Value of the Items Peerless Indemnity Actually Evaluated.

Peerless Indemnity failed to evaluate **all** the damaged and/or destroyed items. When told about its failure to evaluate all the stock, Peerless Indemnity did not respond even though Nevada law mandates a response. *See* NRS 686A.310(1)(b); NAC 686A.665(3) and NAC 686A.675(5). After Garnet Mercantile filed this lawsuit, Peerless Indemnity belatedly demanded appraisal. The determination of whether Peerless Indemnity failed to evaluate all the damaged business

1 property is outside the scope of appraisal.

2 Peerless Indemnity has the burden to establish the appraisal provision applies in
3 instances, such as this, when the insurance company does not do a full and complete
4 investigation and therefore fails to evaluate all the damaged property. *See Intel Corp. v. Hartford*
5 *Accident & Indem. Co.*, 952 F2d 1551 (9th Cir. 1991).

6 Peerless Indemnity is in complete control of the insurance contract, including the
7 appraisal provision. *Insurance Corp. of Am. v. Rubin*, 107 Nev. 610, 616 (1991). For that reason,
8 when there is doubt as to the meaning of a term, all doubts are construed against Peerless
9 Indemnity and in favor of the Garnet Mercantile. *Id.* An ambiguity exists when a policy term is
10 subject to two reasonable interpretations. Any ambiguity in the terms of an insurance contract
11 shall be resolved in favor of the insured and against the insurer. *Nat'l Union Fire Ins. Co. of*
12 *State of Pa., Inc. v. Reno's Executive Air, Inc.*, 100 Nev. 360, 365, 682 P.2d 1380 (1984). All
13 doubts must be construed in favor of finding the appraisal provision does not apply in this
14 instance.

15 The appraisal provision written by Peerless Indemnity does not clearly provide that the
16 insurance company can demand appraisal after it failed to evaluate all the damaged property.
17 Peerless Indemnity's appraisal provision is very narrow. The optional appraisal provision
18 provides, in pertinent part: "If we and you disagree on **the amount of loss**, either may make
19 written demand for an appraisal of the loss." (Emphasis added). The Policy does not define the
20 term "loss." The policy also does not define the phrase "the amount of loss."

21 Peerless Indemnity's interpretation of its appraisal provision is that it can fail to do any
22 investigation whatsoever and then put an arbitrary value on the damaged or lost property. Then,
23 after the insured disputes that arbitrary value, Peerless Indemnity could demand appraisal and
24 have the insured pay the cost of doing a property investigation. Such a scenario flips how claims
25 are supposed to be handled on its head. An insurance company has the duty and obligation to
26 investigate and evaluate the claim. An insurance company cannot escape that duty, as Peerless
27 Indemnity attempts to do here, by demanding appraisal. Peerless Indemnity's interpretation of its
28 appraisal provision is unreasonable.

A more reasonable interpretation is that appraisal can be demanded *only* when the parties dispute the value put on an item. For instance, the insurance company states the value of a totaled vehicle is \$15,000 and the insured believes the value to be \$20,000. In that instance, an appraisal would allow both parties to select an appraiser to put a value on the vehicle. The Policy's appraisal provision does not allow an insurer to request an appraisal to make-up for its failure to conduct a proper evaluation in the first instance.

F. Plaintiff's Causes of Action for Bad Faith and Violation of Nevada's Unfair Claims Practices Act Are Outside the Scope of Appraisal.

Peerless Indemnity cannot require Garnet Mercantile to appraise disputes that are outside the scope of the appraisal provision. In *St. Paul Fire & Marine Ins. Co. v. Wright*, 97 Nev. 308, 629 P.2d 1202 (1981) the Nevada Supreme Court observed that appraisals in insurance contracts are dissimilar from true arbitration agreements, in that appraisers have more limited powers, and their decisions do not encompass disposition of an entire controversy, but are confined to resolution of the specific issues identified in the appraisal provision.

Contrary to arbitration, where the arbitrator is frequently given "broad powers, appraisers generally have more limited powers." (Emphasis in original.) *Jefferson Ins. Co. of N.Y. v. Superior Court*, 3 Cal.3d 398, 90 Cal.Rptr. 608, 611, 475 P.2d 880, 883 (1970). An appraiser's power generally does not "encompass the disposition of the entire controversy between the parties ..."

Id. at 310.

See also Miller v. USAA Casualty Insurance Co., 44 P.3d 663 (Utah 2002):

Although appraisals may be used as another form of alternative dispute resolution, it is not arbitration An appraisal is an informal, independent investigation conducted by individuals who "base their decisions on their own knowledge." Teachworth, 898 F.2d at 1062. An appraisal is conducted "without hearing or judicial inquiry." 6 C.J.S. Arbitration § 3 (1975). In addition, unlike arbitration, "appraisal ordinarily settles only a subsidiary or incidental matter rather than the main controversy as does an arbitration award." *Id.*

In *Miller v. USAA*, *supra*, the court held that a litigant's constitutional right to its day in court "constrains a court to compel appraisal of a dispute only if the parties expressly and unequivocally agreed to resolve the 'particular disputed issue' by appraisal, thereby waiving their constitutional right to judicial resolution of the dispute in question [cites omitted]." The court went on to observe that the appraisal clause in question was limited to a loss or damage

determination and that “none of the ‘extra-contractual’ claims asserted in the complaint pertained to the amount of loss under the policy.” The court held: “Therefore the district court should have compelled only appraisal of the contractual claim and erred by dismissing the extra contractual claims under the appraisal clause.” 44 P .3d at 678 (emphasis added).

In *St. Paul, supra*, the court also cited and relied on the seminal “appraisal” case of *Jefferson Ins. Co. of N.Y. v. Superior Court*, 3 Cal.3d, 90 Cal.Rptr. 608, 475 P.2d 880 (1970), in holding that appraisers in the insurance policy context are limited to a determination of the matters specifically set forth in the appraisal provision, but “it is certainly not their function to resolve questions of coverage and interpret provisions of the policy.” *St. Paul, supra*, 609 P2d. 1203. Even in a full blown arbitration context, an arbitrator’s jurisdiction is strictly limited to determining only those issues that have clearly and unmistakably been entrusted to arbitration under the arbitration agreement. Parties are not required to arbitrate disputes that are outside the scope of the arbitration provision.

Peerless Indemnity cannot require Garnet Mercantile to appraise disputes that are outside the scope of the appraisal provision. Garnet Mercantile’s causes of action for bad faith and violations of the unfair trade practices act are outside the very narrow appraisal provision and thus are not subject to appraisal.

Because insurance appraisals are so narrow and limited in scope, cases hold they do not even qualify as “arbitrations” subject to the Federal Arbitration Act. Nevertheless, even the Federal Arbitration Act “does not require parties to arbitrate when they have not agreed to do so.” *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 293 (2002) (“The FAA directs courts to place arbitration agreements on an equal footing with other contracts, but it does not require parties to arbitrate when they have not agreed to do so”); *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 648 (1986) (quoting *United Steelworkers of Am v. Warrior & Gulf Nev. Co.*, 363 U.S. 574, 582 (1960) (“[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit”)); *Samson v. NAMA Holdings, Inc.* 637 F.3d 915, 923 (9th Cir. 2011) (“... arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to

submit.”); *Teamsters Local 315 v. Union Oil Co. of Cal.*, 856 F.2d 1307, 1308 (9th Cir. 1988) (“The duty to arbitration depends solely on the parties’ contractual agreement to settle certain types of disputes by arbitration.”). As such, “parties may agree to limit the issues they choose to arbitrate.” *Stolt-Nielsen S.A. v. Animal Feeds Int’l Corp.*, 130 S.Ct. 1758, 1775-75 (2010). The principle of law limiting “issues” to be arbitrated only to those issues and disputes specifically identified, obviously applies to appraisals as well.

The appraisal provision in the Policy is extremely narrow in scope. The only issue subject to appraisal is “the amount of loss.” Peerless Indemnity cannot “extend” the language to subject Garnet Mercantile’s causes of action for bad faith and violations of Nevada’s unfair claims practices act to “appraisal.” Insurance policies are “adhesion contracts” and construed in favor of the insured. *See United National Co. v. Frontier Ins. Co.*, 120 Nev. 678, 684 (2004) (“an insurance policy is a contract of adhesion - accordingly, the language of an insurance policy is broadly interpreted in order to affect the greatest possible coverage to the insured”). Peerless Indemnity cannot extend its appraisal clause to require an “appraisal” of any and all disputes. Garnet Mercantile has a Seventh Amendment right to a trial by jury on all matters that are not explicitly subject to appraisal, including its causes of action for bad faith and violation of Nevada’s Unfair Claims Practices Act. Peerless Indemnity had a contractual and fiduciary-like duty and obligation to promptly complete its investigation and analysis. All Peerless Indemnity did was delay payment of the loss and fail to fully evaluate the loss. Garnet Mercantile should be allowed to proceed on those causes of action without further delay.

G. Peerless Indemnity is not entitled to a stay.

As set forth in the facts and authorities above, the scope of the appraisal clause is very narrow. None of the claims raised by Garnet Mercantile against Peerless Indemnity in its complaint fall within the appraisal clause. Even if the court compels appraisal, the court must deny Peerless Indemnity’s request to stay this litigation.

The court has a duty to adjudicate disputes properly before it and, according to admonitions set forth in the rules governing process and procedure, federal courts should construe and apply this court’s rules “to secure the just, speedy, and inexpensive determination of

every action and proceeding.” *See* Fed. R. Civ. P. 1. In order to stay this action, the Court must conclude that Garnet Mercantile’s claims “on [their] face” are “within the purview of the [appraisal] clause.” *See Chicago Tribune Co. v. Chicago Typographical Union No. 16/CWA 14408*, 1992 U.S. Dist. LEXIS 13646, *10-11 (N.D. Ill. Sept. 8, 1992) (“Arbitration clauses have been loosely categorized by some courts as ‘broad’ or ‘narrow.’ Generally, broad arbitration clauses are those which provide for arbitration of disputes ‘of any nature of character,’ or simply ‘any and all disputes.’ ... Narrow clauses, on the other hand, are limited by their terms to certain types of disputes ...”) (*citing McDonnell Douglas Fin. Corp. v. Penn. Power & Light Co.*, 858 F.2d 825, 832 (2d Cir. 1988)); *accord Law Offices of Bradley J. Hofland, P.C. v. McFarling*, No. 2:06-cv-00898, 2007 WL 1074096, at *4 (D. Nev. Apr. 9, 2007). As set forth above, none of the claims Garnet Mercantile asserted in the complaint fall within the scope of the appraisal provision of the Policy. None of the claims asserted in the complaint call for a determination or appraisal of the amount of the items already evaluated. The remaining issues involve questions of the scope of the damage and extra/non-contractual claims in nature.

While a court has discretion to stay “non-arbitrable issues ... pending arbitration, there is a preference for proceeding with the non-arbitrable claims when feasible.” *United Commc’ns Hub, Inc. v. Qwest Commc’ns, Inc.*, 46 Fed. Appx. 412, 415 (9th Cir. 2002); *see Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 225 (1985) (J. White, concurring) (“[T]he heavy presumption should be that the arbitration and the lawsuit will each proceed in its normal course”). This is all the more true in the “much more” limited context of an appraisal, and especially where the appraisal would not resolve issues in the lawsuit.

None of the claims asserted in the complaint are subject to the appraisal provision; however, even if one claim was subject to that provision, the court should still not enter a discretionary stay of any of the other claims. In exercising its discretion to stay the remainder, the court is to consider three factors: (1) “the risk of inconsistent rulings;” (2) “the extent to which parties will be bound by the arbitrators’ decision;” and (3) “the prejudice that may result from delays.” *Volkswagen of Am., Inc.*, 474 F.3d at 972. None of these factors support a discretionary stay in this case.

1 First, based on the claims presented, there is no possibility of inconsistent rulings.
 2 Second, because none of the claims implicate the appraisal provision, no one would be “bound”
 3 by the appraisal decision with respect to the claims before the court and all parties could pursue
 4 legal proceedings on all of those claims. Nor would any appraisal award have any collateral
 5 estoppel or res judicata effect on any of the claims in this action. Third, Garnet Mercantile will be
 6 prejudiced by a stay of its claims. This loss occurred more than two years ago, and the delay in
 7 obtaining the proceeds of the policy has already had a devastating effect on Garnet Mercantile, its
 8 business, reputation, and future prospects.

9 V. CONCLUSION

10 For the foregoing reasons, the Court should deny Peerless Indemnity’s motion to dismiss.
 11 The Court should also deny Peerless Indemnity’s alternative request to compel appraisal and stay
 12 this matter.

13 DATED: This 23rd day of March, 2015.

14 **LEVERTY & ASSOCIATES LAW CHTD.**

15 /S/ Patrick Leverty

16 Vernon E. Leverty, Esq., NV Bar No. 1266
 17 Patrick R. Leverty, Esq., NV Bar No. 8840
 18 832 Willow Street
 19 Reno, Nevada 89502
 20 Ph: (775) 322-6636 • Fax: (775) 322-3953
 21 Attorneys for Plaintiff Garnet Mercantile
 22
 23
 24
 25
 26
 27
 28

Leverty & Associates Law
 CHARTERED
 ATTORNEYS AND COUNSELORS AT LAW
 "Reno Gold House"
 832 WILLOW STREET
 RENO, NEVADA 89502

CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to counsel of record, including the following:

Amy M. Samberg, Esq. Joshua D. Cools, Esq. 3883 Howard Hughes Parkway Suite 1100 Las Vegas, NV 89169 Attorneys for Defendant Peerless Indemnity Insurance Company	
---	--

DATED this 23rd day of March, 2015.

/S/ Patrick Leverty
An employee of Leverty & Associates Law Chtd.

Leverty & Associates Law
CHARTERED
ATTORNEYS AND COUNSELORS AT LAW
"Pono Good House"
832 WILLOW STREET
RENO, NEVADA 89502